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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-41

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,
Petitioner,

vs.

FLAIR BUILDERS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

International Union of Operating Engineers, Local 150, AFL-CIO (hereinafter referred to as "Petitioner"), prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on February 5, 1971.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals is recorded at 440 F. 2d 557 (7th Cir. 1971) and is presented in its entirety in Appendix A herein, *infra* (pages A1 through A9). The Memorandum of Opinion of the District Court is reported at ..... F. Supp. ..... and is printed in its entirety in Appendix B hereto, *infra* (pages A10 through A12).

JURISDICTION.

The judgment of the Court of Appeals, appearing in Appendix A hereto, *infra*, was entered on February 5, 1971. Re-hearing was denied on April 12, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTION PRESENTED.

Once a federal court has determined that a dispute is arbitrable under a collective bargaining agreement, must questions of delay in seeking arbitration such as laches be decided by an arbitrator rather than the federal court?

STATUTE INVOLVED.

The statute involved herein is the Labor-Management Relations Act, 1947, Title III, § 301, 61 Stat. 156, 29 U. S. C. 185(a), as amended. The language of the aforementioned statutory provision is set forth and printed in Appendix C, *infra*, at page A13.

STATEMENT.

Nature of the Case.

The Petitioner initially brought suit in Federal District Court seeking enforcement of its collective bargaining agreement to which the Petitioner and the Respondent were parties. The action was brought pursuant to § 301 of the Labor-Management Relations Act of 1947, as amended.

In dismissing the initial complaint (App. 7-11, 12-14), the District Court stated that the primary dispute between the parties—whether they were bound to the collective bargaining agreement—should be submitted to arbitration (App. 14).[1]

Thereafter, the Petitioner demanded arbitration which demand was refused by the Respondent (App. 18-19, 22, 29).

Accordingly, the Petitioner then filed an amended complaint requesting the enforcement of its demand for arbitration (App. 16-19). The Respondent thereafter filed a motion to dismiss alleging that the Petitioner was guilty of laches in bringing said dispute to arbitration (App. 23-24). The District Court, in denying the motion to dismiss, held that laches is a procedural question which should be decided by an arbitrator and not by the federal court (App. 26). In addition, the Court ordered a hearing for the *limited purpose* of determining whether the parties had entered into a binding collective bargaining agreement (App. 27).

The hearing was held on October 24, 1969. The District Court held that the Respondent was bound by the collective

1. The printed Appendix filed with the Court of Appeals has been submitted herewith. References to same will appear as "App."

bargaining agreement and accordingly was required to arbitrate the dispute (App. 150). However, notwithstanding the limited scope of the hearing and its prior holding that the issue of laches is a procedural question which must be decided by an arbitrator, the District Court, nevertheless, determined the issue of laches, found the Petitioner guilty of laches and dismissed the amended complaint (App. 151).

The Seventh Circuit subsequently affirmed the decision of the District Court in a 2-1 decision, Judge Stevens, dissenting (Appendix A, this Brief, pages A1-A9).

The Facts: Collective Bargaining History.

The Petitioner negotiates master collective bargaining agreements with several contractor associations in the State of Illinois (App. 48, 56, 103, 124). In addition, the Petitioner enters into individual memoranda of agreement with contractors who are not members of the contractor associations (App. 49, 55, 122-123). Such a memorandum specifically adopts and binds the Petitioner and the non-member contractor to the terms and conditions of the master agreement (App. 122).

On June 1, 1963, the Petitioner entered into a master collective bargaining agreement (hereinafter referred to as the "Master Agreement"), with various contractor associations covering building construction in Will, Kendall, Grundy, Kane, and Kankakee Counties, Illinois (App. 48-49, 103). Thereafter, on May 12, 1964, the Petitioner and the Respondent, who was not a member of any of these contractor associations, executed a memorandum of agreement (hereinafter referred to as the "Memorandum") (App. 46-47, 49-50, 73, 85, 122). This Memorandum specifically adopted and bound the Respondent to the terms

and conditions of the aforementioned existing Master Agreement (App. 122). In addition, under the terms of the Memorandum, the Respondent agreed to adopt any additional Master Agreements entered into by the Petitioner and the Fox Valley Contractors Association, one of the signatory contractor associations to the Master Agreement (App. 55, 122).

Union Relations With the Company 1964-1966.

At the time the Memorandum was executed by the parties, the Respondent employed one Jerry Rumsey, to operate equipment covered by the Master Agreement (App. 44-45, 84, 86). Rumsey became a member of the union on the same day the Memorandum was signed (App. 45, 47, 73, 85). Thereafter, the Petitioner's business agent, Ambrose Meagher, received a number of complaints from Rumsey that he was not being paid the wage scale set forth in the Master Agreement (App. 50). Meagher went out to the Respondent's job site a number of times to investigate the complaints and advised Robert V. Richards, the Respondent's president, to pay the correct wage scale (App. 50-51). However, Richards refused to pay the appropriate wage scale and even admitted that he was paying wages which were less than those required by the Master Agreement (App. 50-52, 100). After these numerous attempts to secure his correct wages, Rumsey quit (App. 52, 66, 86-87). Meagher made one more attempt to obtain the full wages for Rumsey after the latter had quit; however, Richards refused to pay same and Rumsey decided not to press the issue any further (App. 52).[2]

2. While Richards admitted that he had not paid the correct wage scale since he had advanced Rumsey's initiation fee and was deducting the fee from Rumsey's wages, he denied having conversations with Meagher about it either while Rumsey was on the job or after he had quit. (App. 50-52, 86-88, 99-100.)

After Rumsey quit, the Respondent subcontracted certain excavating work to another employer (App. 53, 88-89). During the summer of 1964, it was undisputed that Meagher visited the job site several times and observed this subcontractor performing the excavating work and had some conversations with him (App. 53). Accordingly, the Petitioner had no complaints in regard to its Agreement with the Respondent during this period since the excavating work covered by that Agreement was being performed by the subcontractor and not by the Respondent (App. 53).

1965-1966.

In 1965 and 1966 the Petitioner's business representative, Meagher, again made a number of visits to the Respondent's construction site (App. 53-54). He observed the subcontractor performing excavation work and had various conversations with him and accordingly had no contract disputes with the Respondent (App. 53-55, 91, 95, 98-99).[3]

The New Master Collective Bargaining Agreement—1966.

On June 1, 1966, the Petitioner and the aforementioned contractor associations entered into a new master collective bargaining agreement (hereinafter referred to as the "New Master Agreement") (App. 55-56, 124). Under the terms of the existing Memorandum and specifically paragraph 3 therein, the Petitioner and the Respondent had agreed to adopt the terms and conditions of any new master

3. Richards testified that during 1965 some of his non-union employees operated equipment which came within the scope of the Master Agreement (App. 88-89). However, there was no evidence in the record that either the Petitioner or its business agent, Meagher, ever had knowledge of this fact.

agreement entered into between the Petitioner and the Fox Valley Contractors Association unless either party gave notice of termination (App. 122, ¶ 3). In order to terminate the Memorandum either party was required to give notice of termination at least three calendar months prior to the expiration of the existing master agreement (App. 122-123).

Neither party gave notice of termination and accordingly, on June 1, 1966, the parties adopted the terms and conditions of the new Master Agreement (App. 122).[4]

During the winter of 1966-1967, Meagher visited the construction site on numerous occasions and observed that the job had been shut down due to inclement weather (App. 57, 89-90).

Union Relations with the Company—1967-1968.

1967—The Respondent's Attempt to Avoid the Union's Security Provision as Well as the Entire New Master Agreement.

In the Spring of 1967, Meagher received a complaint that a non-union man was operating equipment on the Respondent's construction site. Meagher investigated the complaint, spoke with the non-union employee and told Richards that the employee was required to join the Petitioner pursuant to the union security provision of the New Master Agreement (App. 57-58, 68, 69-70). However, Richards refused to cooperate (App. 58).

4. It was undisputed that the general business practice of the Petitioner was to mail a copy of the new master agreements to every contractor who had signed a memorandum and who had not submitted a notice of termination of same (App. 57). Richards testified that he did not receive a copy of the new Master Agreement (App. 110); however, Meagher testified that the Petitioner utilized this standard procedure in this case (App. 66).

Thereafter, Meagher visited the job site on several occasions and each time he observed a different non-union employee operating equipment (App. 59-60, 68-69, 99). Meagher contacted Richards each time and explained that employees covered by the New Master Agreement were required to join the Petitioner; however, Richards refused to comply with the terms of the New Master Agreement (App. 59-60).[5]

Finally, in the Fall of 1967, Meagher again warned Richards that he was required to live up to the terms of the New Master Agreement, and Richards replied that he was never going to abide by the New Master Agreement and threatened to have Meagher arrested (App. 60).[6]

During the winter of 1967-1968 Meagher visited the job site a few times and observed no activity on the site (App. 60).

1968.

In June, 1968, Meagher visited the job site and discovered another non-union employee, one Floyd Schimmelpfennig, operating equipment (App. 61, 69). Meagher and

5. The union security provision of the New Master Agreement provided that an employee is required to join the union after the 7th but not later than the 10th day of employment (App. 127-128). Since the Respondent utilized a constant flow of new employees on the same equipment, it successfully avoided the impact of the union security provision. In this regard Richards even admitted that during 1967 he shuffled different employees back and forth on his various pieces of equipment (App. 99). However, Richards again denied having contact with anyone from the Petitioner during 1967 (App. 95-99).

6. In addition to Richards, the Respondent called Richards' brother, Thomas Stanley Richards, a foreman for the company, as a witness (App. 78). Initially, the foreman attempted to convey the impression that no one from the Petitioner had visited the Respondent's job site prior to 1969 (App. 79-80). However, when pressed on cross-examination, this witness admitted that he was not always on the job site and further that representatives of the Petitioner might have visited the Respondent's office which was located off the job site (App. 81-82).

Schimmelpfennig had a conversation, the result of which was that the latter decided to join the Petitioner (App. 61-62, 70-71). Shortly thereafter, in July, Schimmelpfennig joined the Petitioner and Meagher went to the job site and told Richards he would have to abide by the terms of the New Master Agreement in regard to Schimmelpfennig's employment (App. 62, 95). Richards flatly refused to abide by the New Master Agreement, stated that he did not believe in the Petitioner and was not going to pay the union wage scale (App. 62, 95). Schimmelpfennig did not receive the union scale and accordingly, a week later Meagher and William Anderson, another business representative of the Petitioner, visited the job site and demanded that Richards pay the correct wages (App. 63, 76-77, 95-96, 99). Richards again refused to pay the wages in accordance with the scale set forth in the New Master Agreement (App. 63, 76).

Thereafter, Meagher visited the job site several times during that summer and after receiving the same responses from Richards, the Petitioner filed suit to enforce its collective bargaining agreement (App. 63-64).

In addition, the Petitioner filed a charge with the National Labor Relations Board and a complaint with the United States Department of Labor (App. 64).[7]

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7. In this regard, the Petitioner filed a complaint with the Wage and Hour Division of the Department of Labor on behalf of Schimmelpfennig for back wages (App. 64). The wage and hour complaint was substantiated in favor of Schimmelpfennig (App. 64). Thereafter, the Respondent discharged Schimmelpfennig and an unfair labor practice charge was filed against the Respondent with the National Labor Relations Board (App. 64). As a result of the filing of said charge, Schimmelpfennig received back pay and was offered reinstatement as part of a settlement agreement between the Labor Board and the Respondent (App. 64).

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT WHICH HOLD THAT ONCE A FEDERAL COURT DETERMINES THAT A DISPUTE IS ARBITRABLE UNDER THE TERMS OF A COLLECTIVE BARGAINING AGREEMENT, THE ISSUE OF DELAY IN SEEKING ARBITRATION IS FOR AN ARBITRATOR AND NOT THE FEDERAL COURT.

This Court has fashioned a federal common labor law which limits the role of the federal court and concurrently expands the role of arbitration in labor disputes. More specifically, a federal court is confined to ascertaining whether the dispute is arbitrable under the terms of the collective bargaining agreement. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957); *Steelworkers Trilogy*,[8] *John Wiley & Sons* v. *Livingston*, 376 U. S. 543 (1964). Once it is determined that the agreement requires the parties to arbitrate their dispute, the role of the federal court is terminated. *Wiley, supra.*

Perhaps the most significant language enunciated by this Court in the *Steelworkers Trilogy, supra*, with regard to the role of the federal court in determining arbitrability is as follows:

> . . . The function of the court is *very limited* when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to *ascertaining whether the party seeking arbitration is*

8. *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

> *making a claim which on it face is governed by the contract.* Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for. (363 U. S. at 567-568) (Emphasis supplied.)

Indeed, this Court has most recently reaffirmed the federal policy favoring arbitration in *The Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U. S. 235 (1970).

In light of the above, once the lower court determined that the instant dispute was arbitrable, was there then any basis for the lower court's expanding its judicial inquiry and determining the issue of delay in seeking arbitration?[9]

The answer to this question was provided by this Court in *Wiley, supra.* In that case, as in the instant matter, the company rejected the very existence of the collective bargaining agreement, and the union, as herein, did not resort to any grievance procedure but filed suit seeking arbitration. The company then raised the defense of delay in seeking arbitration, and this Court held that that specific question must be decided by an arbitrator and not the federal court as follows:

> *Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator* . . . (376 U. S. at 557) (Emphasis supplied.)

However, the Majority opinion in the Court below held that a federal court can go beyond determining the issue of arbitrability and decide a defense relating to delay in

9. It is to be noted that the isuse of arbitrability was not raised by the Respondent in the Court of Appeals.

seeking arbitration—laches (App. A, This Brief, page A1). In taking this position, the Majority made no mention and accordingly gave no consideration to the landmark decisions of this Court limiting the role of the federal courts in *Textile Workers, supra; Steelworkers Trilogy, supra;* and *The Boys Markets, supra.* The only Supreme Court decision to which the Majority below addressed itself was *Wiley, supra.* However, in doing so, the Majority cited *Wiley* as holding that only questions involving the technical compliance with the time limitations of a grievance procedure may be submitted to an arbitrator, and that questions of delay in seeking arbitration such as laches may be determined by a federal court.

However, this was not the holding in *Wiley. Wiley* clearly demonstrates that the union therein *never* resorted to any grievance procedure but instead sought arbitration in federal court. Accordingly, the issue of delay in *Wiley* bore no relationship to the technical compliance with the time limitations of a grievance procedure, but rather related to whether the union was guilty of delay in seeking arbitration in federal court. That is the same factual issue which was before the Court below in the instant matter. Accordingly, the Majority's citing of *Wiley* to support its decision is, to utilize the language of the Majority below, a "procrustean reading of *Wiley.*"

In addition, the Majority's holding is totally inconsistent with the reasoning set forth by this Court for limiting the role of federal courts. In *Wiley,* this Court pointed out that questions of delay in seeking arbitration cannot be answered without a consideration of the merits of the dispute. As this Court stated:

> Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or *whether the*

> *unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration* . . . (376 U. S. at 557) (Emphasis supplied.)

Accordingly, this Court held that once arbitrability is determined, questions of delay are then for the arbitrator and not the federal court.

However, the Majority below disregarded *Wiley,* went beyond the issue of arbitrability and delved into the merits of the case in order to determine the question of laches. In deciding the question of laches, the Majority characterized the dispute as "amorphous" and "vaguely delineated," and made factual determinations relating to the conduct of the parties during the entire dispute. It based these determinations upon a record which the District Court had deliberately *limited* to the sole question of whether the parties were bound to the collective bargaining agreement (App. B, This Brief, page A10). Accordingly, the Majority below made its determination *on the merits,* based upon a record which did not disclose all of the evidence and thereby raised numerous factual questions which remained unanswered.

This is precisely the point raised by the Dissent below as follows:

> The appropriateness of laches as a defense to a labor dispute involves a consideration of several questions which can best be answered by one who is familiar with the collective bargaining relationship between the parties. Although the trial court stated that the defense of the union's charges would impose an "extreme burden" on Flair, the record does not answer these questions: Does the area-wide master agreement contemplate that a small employer like Flair shall have the burden of full compliance with its

terms? Would routine records ordinarily retained by employers disclose the information on which Flair relies to justify its disregard of its written undertakings? Was the lack of communication between the union and Flair entirely the fault of the union? Even if it was too late in 1968 for the union to question Flair's breaches in 1964 and 1965, was it also too late to ask a neutral third party to pass judgment on 1966 and 1967 breaches, as well as a continuing refusal to abide by the agreement?

The task of answering questions such as these—determining whether the union's delay was unreasonable and whether Flair's defense has been significantly prejudiced by that delay—inevitably involves a consideration of the merits of the underlying dispute between the parties. This task should, therefore, be performed by the arbiter who is also responsible for deciding the merits of the basic controversy. (App. A, This Brief, pages A8-9) (Emphasis supplied.)

Accordingly, the decision of the Majority below clearly illustrates the wisdom of *Wiley* in limiting the role of the federal court to determining arbitrability and referring other questions such as delay in seeking arbitration to the arbitrator.

Moreover, this Court in *Wiley* cited additional reasons for reserving the determination of laches for an arbitrator rather than a federal court. This Court pointed out that permitting a federal court to determine the question of delay will not only result in prolonged delay but also unnecessary duplication of effort. For example, a union or an employer can refuse to arbitrate a dispute, compel the other party to seek enforcement of their arbitration clause in federal court, and then raise the defense of laches which would result in lengthy and expensive litigation including the right of appeal on the delay issue alone. Moreover, even if the federal court ordered arbitration, the issue of

laches may again be raised in arbitration. As this Court stated in *Wiley*:

> . . . Reservation of "procedural" issues for the courts would thus not only create the difficult task of separating related issues, but *would also produce frequent duplication of effort* . . . (376 U. S. at 558) (Emphasis supplied.)
>
> * * * * *
>
> While the courts have the task of determining "substantive arbitrability," there will be cases in which arbitrability of the subject matter is unquestioned but a dispute arises over the procedures to be followed. In all of such cases, acceptance of Wiley's (Defendant's) position *would produce the delay attendant upon judicial proceedings preliminary to arbitration.* As this case, commenced in January 1962 and not yet committed to arbitration, well illustrates, *such delay may entirely eliminate the prospect of a speedy arbitrated settlement of the dispute, to the disadvantage of the parties (who, in addition, will have to bear increased costs) and contrary to the aims of national labor policy* (376 U. S. at 558). (Emphasis supplied.)

This teaching of *Wiley* was further pointed out by the Dissent below as follows:

> . . . Separating laches from the merits for trial before a separate tribunal will frequently result in an unnecessary duplication of effort and may commit the disposition of the laches issue to the tribunal which is less qualified to evaluate it fairly in the context of the collective bargaining relationship . . . (App. A, This Brief, page A9).

In this regard, the instant matter was initiated almost three years ago, but could have been resolved long ago in arbitration had the defense of laches not been heard by the District Court. Furthermore, lengthy delays must result since there are no precise benchmarks for determining

laches and each case will have to be decided upon its own facts.

In addition, it is submitted that if a federal court is allowed to consider laches in determining arbitrability, a veritable Pandora's Box will be opened since defendants will then be able to raise other affirmative defenses allowed under Rule 8(c) of the Federal Rules of Civil Procedure such as waiver, duress, and estoppel. Accordingly, the process of labor arbitration will become a languid and inefficient method for resolving labor disputes and its hallmark will be delay and duplication rather than efficiency and effectiveness.

Finally, from a union's point of view, the consideration for giving up its right to strike is the agreement to arbitrate labor disputes speedily and efficiently. As this Court pointed out in *Textile Workers, supra:*

> Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation (Section 301) does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way. (353 U. S. at 455)

Once the availability of *immediate* arbitration is removed from the context of a labor dispute, the consideration for maintaining industrial peace is effectively eliminated. Accordingly, it is submitted that a party who is subjected to extensive litigation over the determination of delay questions such as laches may well resort to an alternative in the form of self-help—a strike or a lockout—to resolve the dispute. Obviously, this is precisely the consequence which this Court has steadfastly sought to avoid in its development of federal labor policy from *Textile Workers,*

supra, to its most recent decision in *The Boy's Markets, supra.* See also Dissent below (App. A, This Brief, page A8).

Suffice it to say, the opinion of the Majority below is contrary to the applicable decisions of this Court.

II.

THE INSTANT HOLDING IS IN DIRECT CONFLICT WITH OPINIONS OF THE FEDERAL COURTS OF APPEALS.

As noted above, the decision of the Majority below is in direct conflict with the decisions of this Court establishing federal labor law in the area of arbitration. *Textile Workers, supra; Steelworkers Trilogy, supra; Wiley, supra; The Boy's Markets, supra.*

In addition, the opinion of the Majority below is in conflict with decisions in the Second Circuit in *I. U. E.* v. *Westinghouse Electric Corp.*, 218 F. Supp. 82 (S. D. N. Y. 1963), aff'd., 326 F. 2d 758 (2d Cir. 1964), where the Court of Appeals affirmed the refusal of the District Court to determine the defense of laches which was raised in connection with an alleged delay in seeking arbitration. As the District Court had stated therein:

> The defendant's challenge to four of the grievances, insofar as it advances the *plea of laches;* may be readily disposed of. *Any contention of delay in the presentation and prosecution of grievances is a matter within the competence of the arbitrator if otherwise they are arbitrable.* (218 F. Supp. at 86) (Emphasis supplied)

In rendering this decision, the District Court relied upon the Second Circuit's decision in *Wiley* which was subsequently affirmed by this Court.

Furthermore, the Third, Fifth and Ninth Circuits have relied upon *Wiley, supra,* and held that questions of delay

in seeking arbitration should be referred to arbitration and not the federal courts. See *Local Lodge No. 595 of Dist. No. 152* v. *Howe Sound Co. (Inc.)*, 350 F. 2d 508 (3rd Cir. 1965); *United Steelworkers of America* v. *American Int'l. Aluminum Corp.*, 334 F. 2d 147 (5th Cir. 1964), cert. denied, 379 U. S. 991 (1965); *Columbian Carbon Co.* v. *IUOE Local No. 405*, 360 F. 2d 1018 (5th Cir. 1966); *Local Union No. 490 United Rubber, Cork, Linoleum, and Plastic Wkrs.* v. *Kirkhill Rubber Co.*, 367 F. 2d 956 (9th Cir. 1966).

On the other hand, the Sixth Circuit in *Amalgamated Clothing Wkrs.* v. *Ironall Factories Co., Inc.*, 386 F. 2d 586 (6th Cir. 1967) supported and was relied upon by the Majority below.

Finally, the opinion of the Majority below is in direct conflict with its own prior decision in *Local Union No. 51, IBEW* v. *Illinois Power Co.*, 357 F. 2d 916 (7th Cir. 1966) wherein the Seventh Circuit held that the defense of *waiver* in connection with an alleged delay in seeking arbitration is a question for the arbitrator and not for the federal court. It should be noted that waiver, as laches, is an affirmative defense under the Federal Rules of Civil Procedure relating to delay in the exercise of a right.[10] It is submitted that whether one labels the defense of delay as "laches" or "waiver", the same considerations nevertheless apply. Such a question of delay in seeking arbitration is required to be submitted to an arbitrator rather than a federal court.

10. Fed. R. Civ. P. 8(c).

CONCLUSION.

For the reasons stated herein, it is respectfully requested that a Writ of Certiorari be granted.

Respectfully submitted,

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Dated at Chicago, June 24, 1971.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS

for the Seventh Circuit.

September Term, 1970 — September Session, 1970

No. 18334

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO, *Plaintiff-Appellant,*

vs.

FLAIR BUILDERS, INC., *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

FEBRUARY 5, 1971.

Before SWYGERT, *Chief Judge,* DUFFY, *Senior Circuit Judge, and* STEVENS, *Circuit Judge.*

SWYGERT, *Chief Judge.* The primary question in this appeal is whether a court may properly dismiss the complaint on the basis of laches resulting from dilatory notification of the existence of a dispute in a suit brought to compel arbitration with regard to the dispute.

This action was brought in November 1968 by the International Union of Operating Engineers, Local 150, AFL-CIO, under section 301 of the Labor Management Relations Act of 1947, 29 U. S. C. § 185(a), against Flair Builders, Inc., a construction company located in Sugar Grove, Illinois.

Initially, the union sought specific performance of an alleged bargaining agreement between the parties. Upon Flair's motion the district court dismissed the complaint for failure to state a claim. At the time of the dismissal the district judge, having observed that an "additional issue" had been suggested by the parties, namely, whether a "memorandum agreement" executed by the parties constituted a binding collective bargaining agreement, suggested that this issue be submitted to arbitration. Thereafter, the union demanded arbitration of "the issues pending before the court concerning the applicability of the contract and the subsequent issues of possible violations." After Flair refused to arbitrate, the union filed an amended complaint seeking to compel arbitration.

The company filed a motion to dismiss the amended complaint, contending that the action was barred by laches. The motion was denied, and the cause was set for an evidentiary hearing to determine which issues, if any, the employer agreed to arbitrate. After hearing evidence, the court filed its order and memorandum opinion dismissing the action. A summary of the evidence submitted to the district court follows.

The union represents laborers who operate heavy equipment, such as cranes, in the construction industry and negotiates master collective bargaining agreements with contractor associations in various parts of Illinois. The union also negotiates individual memoranda of agreement with contractors who are not members of the contractor associations, such as Flair. These memoranda adopt and bind the nonmember contractor to the terms of the master agreements.

On June 1, 1963, the union entered into a master agreement with a number of contractor associations in northern Illinois. This agreement terminated on May 31, 1966. On

May 12, 1964, the union and Flair signed a memorandum of agreement which specifically adopted the terms of the then existing master agreement. Flair also agreed to adopt any additional master agreements entered into between the union and the contractor associations.

At the time of execution of the memorandum in 1964, the company had one employee covered by the agreement. Upon the insistence of the union this employee joined the union, but left his employment about two weeks later. Other nonunion employees continued from time to time to operate Flair's single piece of equipment. In 1965 the company added a second piece of heavy equipment, in 1966 a third, and in 1967 a fourth, all of which were operated by company employees who were nonunion. Yet during all this period of time, from May 1964 until the summer of 1968, the company was not contacted by the union.

In the meantime, in 1966, the union and the contractor associations entered into a new master agreement which contained a stipulation that "should any difference arise between the parties hereto which cannot be settled by their representatives, within 48 hours of the occurrence, such difference shall be submitted to arbitration." It was further stipulated that the arbitrators should meet within six days after it was determined that the dispute could not be settled.

In June 1968, the union business agent visited the company's job site and discovered a nonunion employee operating a piece of equipment. Shortly thereafter, the employee joined the union; however, the company refused to pay the union wage scale.[1] Subsequently the union filed the instant suit.

1. In the fall of 1968 the union filed a complaint with the Wage and Hour Division of the Department of Labor on behalf of the employee for back wages. After the complaint was sustained, the employee was discharged. Thereupon an unfair labor practice

In dismissing the action, the district court ruled that the union had been guilty of laches by its unjustified delay in the enforcement of its contract with the company. In the course of his memorandum opinion the district judge said:

> To require Flair to respond, through arbitration, to general charges of noncompliance with contract provisions allegedly beginning more than two years before this suit was filed would impose an extreme burden on its defense efforts. Especially is this so when, as demonstrated at the hearing, Flair understandably considered the contract to have been abandoned soon after its inception. Plaintiff has offered no explanation for its delay in enforcement; yet to compel arbitration would reward plaintiff for its own inaction and subject defendant to the risk of liability because of actions taken or not taken in reliance on plaintiff's apparent abandonment.

The district judge also found that there had been no contact whatsoever between the union and Flair from the date of the signing of the memorandum of agreement in 1964 until the summer of 1968. This determination was made after the district judge had heard conflicting testimony and concluded that the testimony of Flair's witness was more credible than that of the union's business agent because of inconsistencies in the latter's testimony. Such findings of fact based on the credibility of witnesses are entitled to great weight on review. The record reveals no justification for overturning the trial court's findings. Moreover, when the trial judge requested that " the [union] by letter to this court within ten days should specify in some detail what violations of the purported agreement it seeks to arbitrate, and the time of

charge was filed with the National Labor Relations Board. As part of a settlement agreement between the Board and the company, the employee received back pay and was offered reinstatement.

their occurrence . . . ," the union's response was devoid of specificity and amounted to nothing more than the concluding statement of its letter that it sought "to arbitrate the total violation of the entire agreement in question since . . . June 1, 1966."

The factual context of this appeal thus narrows the issue before us to the question of whether a party to a collective bargaining agreement which contains an arbitration clause may be so dilatory in making the existence of vaguely delineated disputes known to the other party that a court is justified in refusing to compel the submission of such disputes to arbitration. The district court found for Flair and dismissed the complaint on the ground of laches. We affirm.

The union contends that the question of whether its dilatory notification of the existence of a dispute should operate to bar this suit to force the employer to arbitration is a question of procedural timeliness which courts are required to leave to the arbitrator for determination pursuant to the Supreme Court's decision in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543 (1964). We find the characterization of such delay as "procedural untimeliness" inappropriate.

The procrustean reading of *Wiley* urged by the union is unsupported by the language of the opinion, and we are convinced that nothing said in *Wiley* forecloses judicial determination that a dispute is so stale before its announcement that courts should decline to compel its submission to arbitration.

Wiley arose out of the refusal by the surviving corporation of a corporate merger to submit to arbitration a dispute between it and a union which had executed a collective bargaining agreement including an arbitration clause with another corporation which did not survive the

merger. As Mr. Justice Harlan noted in the opinion of the Court, the major questions presented in *Wiley* were:

> (1) whether a corporate employer must arbitrate with a union under a bargaining agreement between the union and another corporation which has merged with the employer, and, if so, (2) whether the courts or the arbitrator is the appropriate body to decide whether *procedural prerequisites which, under the bargaining agreement, condition the duty to arbitrate* have been met. 376 U. S. at 544 (emphasis added).

It is thus apparent that, to the extent *Wiley* was concerned with the issue of timeliness of a demand for arbitration, it dealt only with who must decide whether arbitration is barred by untimeliness in the satisfaction of some procedural prerequisite to arbitration deriving from the dictates of the grievance process itself. This conclusion is amply supported by other language in the opinion. For example, the Court stated:

> [W]e do not rule out the possibility that a union might abandon its right to arbitration by failing to make its claims known. . . . The Union made its position known well before the merger and never departed from it. 376 U. S. at 551.

We therefore conclude that *Wiley* determined only that the effect of *intrinsic* untimeliness relating to whether the dictates of a prescribed process for the resolution of union-employer disagreements have been satisfied must be determined by the arbitrator. But that is not the form of delay presently before us. The delay of the union in this case is more appropriately described as *extrinsic* untimeliness in that it does not raise any question of whether prescribed procedures for the resolution of disputes have been satisfied but rather requires the determination of whether delay in the mere notification of the existence of a dispute has prejudiced the ability of the

employer to respond without regard to whether procedural prerequisites to arbitration have been followed. As another circuit has observed in a similar case:

> In deciding whether the union, in this case, is barred from prosecuting its cause of action because of laches, we are not indulging in the judicially unwarranted task of interpreting the collective bargaining agreement. Laches is independent of any procedure established by the collective bargaining agreement and a decision on laches adds or subtracts nothing from the meaning of the agreement. Furthermore, consideration of the issue in no way involves a consideration of the merits of the underlying substantive issue. . . . The union first gave notice of the existence of a dispute . . . more than one year after the dispute arose. . . . Failure to give notice and request arbitration until such a late date would present serious impediments to [the employer] in making an effective defense. *Amalgamated Clothing Workers* v. *Ironall Factories Co.*, 386 F. 2d 586, 591-92 (6th Cir. 1967).

In the instant case, the union is seeking to compel arbitration of an amorphous dispute as to general noncompliance with the provisions of a collective bargaining agreement. Assuming, *arguendo,* that notice of a dispute is effectively given when stated with as little specificity as here, we note that the district court determined from the testimony of conflicting witnesses that there was no contact whatever between the employer and the union from the effective date of the June 1, 1966 master agreement until the summer of 1968. From this, the district court determined that the union's suit to compel arbitration was barred by laches. We find no error in that determination.

The judgment of the district court is affirmed.

STEVENS, *Circuit Judge*, dissenting. This litigation arises out of a collective bargaining agreement which Flair executed in 1964 and which was still in effect when the union filed its complaint in 1968. The union asserts that Flair failed to pay the agreed wages to one employee in 1964, hired nonunion employees in 1965, 1966, and 1967, and generally refused to follow contract procedures for hiring personnel and contributing to a pension fund. The employer defended on the ground that the contract had been abandoned by the union and, therefore, was no longer in effect. The trial court rejected the abandonment defense but held that the union was guilty of laches.

The appropriateness of laches as a defense to a labor dispute involves a consideration of several questions which can best be answered by one who is familiar with the collective bargaining relationship between the parties. Although the trial court stated that the defense of the union's charges would impose an "extreme burden" on Flair, the record does not answer these questions: Does the area-wide master agreement contemplate that a small employer like Flair shall have the burden of full compliance with its terms? Would routine records ordinarily retained by employers disclose the information on which Flair relies to justify its disregard of its written undertakings? Was the lack of communication between the union and Flair entirely the fault of the union? Even if it was too late in 1968 for the union to question Flair's breaches in 1964 and 1965, was it also too late to ask a neutral third party to pass judgment on 1966 and 1967 breaches, as well as a continuing refusal to abide by the agreement?

The task of answering questions such as these—determining whether the union's delay was unreasonable and whether Flair's defense has been significantly prejudiced

by that delay—inevitably involves a consideration of the merits of the underlying dispute between the parties. This task should, therefore, be performed by the arbiter who is also responsible for deciding the merits of the basic controversy.

Considerations affecting the orderly dispositions of litigation, as well as a due regard for our national labor policy, persuade me that the defense of laches should be processed like other "procedural" questions which grow out of the dispute and bear on its final disposition. See *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 556-559; *Local Union No. 51, International Brotherhood of Electrical Workers, AFL-CIO* v. *Illinois Power Company*, 357 F. 2d 916, 918-919 (7th Cir. 1966). Separating laches from the merits for trial before a separate tribunal will frequently result in an unnecessary duplication of effort and may commit the disposition of the laches issue to the tribunal which is less qualified to evaluate it fairly in the context of the collective bargaining relationship. Moreover, even in those cases which are promptly terminated by judicial approval of the defense, the price for efficieney will be some loss of union confidence in the fairness of the procedures which are offered as a substitute for collective self-help. Unless arbitration procedures command labor's respect, less civilized methods of resolving disputes will be employed with greater frequency.

In many collective bargaining agreements the employer has obtained a "no strike" pledge from the union in exchange for a commitment to arbitrate disputes. Unions must honor that bargain. *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U. S. 235. We should compel employers to honor their *quid pro quo*. I would reverse.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT.
* * * (Caption—68-C-2091) * *

MEMORANDUM OPINION.

This is an action to compel arbitration of a labor dispute pursuant to Section 301 of the Labor Management Relations Act, 29 U. S. C. § 185(a). Presently pending before the court is the question whether the parties are bound to submit their differences to arbitration by a valid collective bargaining agreement. Evidence relative to this issue was presented at a hearing on October 24th of this year.

On May 12, 1964, plaintiff union and defendant Flair entered into a memorandum contract in which they agreed to be bound by the "master" agreement then in force between plaintiff and certain General Contractor's Associations, and by subsequent master agreements. The arbitration clause here invoked is found in the master agreement of June 1, 1966.

Defendant challenges the validity of the contract, arguing that it is void and unenforceable for "lack of mutuality." However, the memorandum agreement binds the plaintiff as well as the defendant to the terms and conditions of the master agreement. And similar "incorporating" contracts have uniformly been upheld as valid and binding. See, *e.g.*, *Schlecht* v. *Hiatt*, 271 F. Supp. 644 (D. Ore. 1967); *Line Drivers Local* v. *W. J. Digby, Inc.*, 218 F. Supp. 519 (D. Col. 1963); *cf. Thorn Construction*

Co. v. *International Hod Carriers*, 75 Nev. 420 (1959).[1] Accordingly, I have determined that defendant was bound by the memorandum agreement to arbitrate labor disputes within the limits of the arbitration clause.

The question remains, however, whether the union has been guilty of laches so as to bar it from enforcement of the arbitration cla[illegible].[2] Its complaint seeks to arbitrate its charges that Flair has been in continuous breach of the agreement since June 1, 1966 by its refusal to hire through the union office, pay union wages, or contribute to union funds.

The master agreement contemplates initiation of arbitration proceedings if any dispute is not settled within 48 hours of its occurrence, and further provides that the Board of Arbitrators shall meet "within six (6) days." Yet demand for arbitration was not made in this case until April, 1969, almost five years from Flair's first alleged failure to comply with the contract and nearly three years from the inception of the alleged breach sought to be arbitrated. At the hearing, Robert Richards, the president of Flair, testified that he had no contact whatsoever with the union from the signing of the memorandum contract in 1964 until the summer of 1968, nor did he receive a copy

1. *Ketcher* v. *Sheet Metal Workers International Association*, 115 F. Supp. 802 (E. D. Ark. 1953), and *Teamsters Local 839* v. *Morrison-Knudsen Co.*, 270 F. 2d 530 (9th Cir. 1959), relied on by defendant, are not in point for they did not involve contracts personally entered into by the employer.

2. Although "procedural" questions are to be determined by the arbitrator rather than by the court, *John Wiley & Sons* v. *Livingston*, 376 U. S. 543, 557 (1964), the issue of laches with regard to an arbitration demand is independent of the bargaining contract and therefore properly determined by the court. *Amalgamated Clothing Workers* v. *Ironall Factories Co.*, 386 F. 2d 586, 591 (6th Cir. 1967); *International Ass'n. of Machinists* v. *Hayes Corporation*, 296 F. 2d 238, 244 (5th Cir. 1961); *cf. Reconstruction Finance Corp.* v. *Harrisons & Crosfield*, 204 F. 2d 366, 369 (2d Cir. 1953).

of the 1966 master contract. Furthermore, his only employee within the jurisdiction of plaintiff union quit within a month of the execution of the 1964 agreement; consequently, Flair considered the contract to have been abandoned.

The plaintiff's business agent, Ambrose Meagher conceded that he had no contact with Flair in 1965 or 1966, but contended that he had some discussions with Richards in 1964, 1967 and 1968. Cross-examination revealed inconsistencies, however, between his direct testimony and prior deposition testimony regarding his 1967 visits to the job site, and I find Richards to be the more credible witness.

To require Flair to respond, through arbitration, to general charges of noncompliance with contract provisions allegedly beginning more than two years before this suit was filed would impose an extreme burden on its defense efforts. Especially is this so when, as demonstrated at the hearing, Flair understandably considered the contract to have been abandoned soon after its inception. Plaintiff has offered no explanation for its delay in enforcement; yet to compel arbitration would reward plaintiff for its own inaction and subject defendant to the risk of liability because of actions taken or not taken in reliance on plaintiff's apparent abandonment. *Cf. Amalgamated Clothing Workers v. Ironall Factories, Co., supra,* at 592.

Because plaintiff has been guilty of laches by its unjustified delay in the enforcement of its contract with defendant, an order has been entered today dismissing the complaint.

Enter:

BERNARD M. DECKER,
United States District Judge.

Dated: December 4, 1969.

APPENDIX C.

Section 301(a) of the Labor Management Relations Act, 1947, Title III, 61 Stat. 156, 29 U. S. C. 185(a), as amended, reads as follows:

TITLE III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.